IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.A. No. 519 of 2005.

Judgment reserved on: 26.5.2006

Date of Decision: June 19, 2006

Narinder Kumar alias Ajay …Appellant.

Versus.

State of H.P. … Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting?

For the Appellant(s): **Mr. O.P.Sharma, Sr.Advocate with Mr. Avinash Jaryal, Advocate.**

For the Respondent(s): **Mr. J.S.Guleria, Law Officer.**

Deepak Gupta, J.

The appellant was charged for having committed an offence under Sections 452 and 376 IPC. The prosecution case is that on 2.10.2004, the accused raped the prosecutrix who was a minor girl aged 7 years. Charge against the accused was framed and he pleaded not guilty and claimed trial. On the basis of the evidence led before it, the learned trial Court came to the conclusion that since penetration had not been proved, the offence of rape was not made out. However, it was clearly made out that the accused was guilty of the offence of attempting to rape the minor child. He was also found guilty of having

trespassed into the house of the father of the prosecutrix with an intention to commit offence and, therefore, was found guilty under Section 452 IPC also. He has been sentenced to undergo 5 years imprisonment for the offence under Section 376/511 IPC and to pay fine of Rs. 10,000/- and in default thereto to undergo further imprisonment for one year. For the offence under Section 452 IPC, he was directed to undergo imprisonment of 3 years and to pay fine of Rs.5000/- and in default of payment of fine to undergo imprisonment for one year. Both the sentences were ordered to run concurrently. Aggrieved against this judgment, the appellant-accused has filed the present appeal.

I have heard Shri O.P.Sharma, learned senior counsel for the appellant and Shri J.S.Guleria, learned Law Officer for the State-respondent.

It is contended on behalf of the appellant that no case is made out against the accused. Shri Sharma submits that the case is an absolutely false case which has been lodged only because of the admitted enmity between the family of the prosecutrix and the family of the accused. He submits that no reliance can be placed on the partisan witnesses and prays that the judgment of the court below be set aside and the accused be acquitted. In the alternative, it is prayed that the sentence imposed is excessive and should be substantially reduced keeping in view the young age of the accused. On the other hand Shri J.S.Guleria, learned law Officer submits that the judgment passed by the trial Court

is correct and calls for no interference. He also states that the sentence imposed is just and reasonable.

FIR Ext. PW19/A was recorded on 3.10.2004. This FIR was lodged at the instance of Smt.Lalita Devi mother of the prosecutrix. In the FIR, it is alleged that on 3.10.2004 at about 10 a.m. complainant Smt. Lalita Devi along with her husband Joginder Singh, Satnam Singh and Smt Sandesh Kumari, BDC, Member came to the Police Station and lodged a report that she (the complainant) is a resident of village Fatehpur. She has three children and the eldest is a daughter (prosecutrix) aged about 7 years.. The other two children are younger than the prosecutrix. On 2.10.2004, her husband Joginder Singh had gone outside the village for work. The complainant was at home. She went to attend a meeting of General House of the Panchayat at Fatehpur and her children were alone at home. She returned at about 1.30 p.m.and found that the two younger children were crying. When she entered the room, she saw that accused Narinder Kumar alias Ajay was lying on top of the prosecutrix. He had taken off the salwar of the prosecutrix and covered her face with his hands. According to the complainant, he was committing rape on the prosecutrix. She then pulled her daughter from beneath the accused and slapped her and she also gave one blow of the sickle (Drat) on the foot of the accused. She then caught hold of the accused from his neck and tried to take him to the Panchayat. However, accused Ajay pushed her and ran away. She then went to the Panchayat and told the entire story to the Pradhan and

other persons present there. When her husband came back late in the evening, she told the entire incident to her husband and thereafter she along with other persons came to lodge the report with the police.

The prosecutrix who is only 7 years old was examined as PW6. The trial Court asked her certain questions and after ascertaining that the prosecutrix is able to correctly understand the questions, permitted her to be examined without oath. In her statement, the prosecutrix has stated that her mother went to the Panchayat and her father was out of the village. The accused came and opened her salwar and pulled it down to her knees. He took off his pant. He then laid her down on the cot and covered her face with cloth. Then the accused lay down on top of her. He then placed his penis on the vagina of the prosecutrix. In the meantime her mother came and pulled her out from beneath the accused. Her mother slapped her 2-3 times and hit the accused with a Drat. Thereafter her mother caught hold of the accused from his neck but the accused gave a push to her mother who was holding a child and ran away. Thereafter her mother went to the Panchayat. According to her the police later came and took her for medical examination from the doctor at Nurpur. In cross-examination, she stated that her mother has told her to only tell the truth. She has admitted the fact that the relation between the mother and the accused were not very cordial. She has, however, denied the suggestion that her mother threatened the accused that she would falsely implicate the accused in a criminal case. She has denied the suggestion that she has made up a false case.

Smt.Lalita Devi, mother of the prosecutrix was examined as PW5. She virtually repeated what she has stated in the FIR. According to her, when she returned to her house, the accused was lying on the top of the prosecutrix and he was nude. She had then hit him on his foot with blunt side of a Drat. She extricated her daughter from beneath the accused. Though she caught hold of the accused from his neck but the accused managed to push her and ran away. She then reported the matter to the Panchayat. She has been cross-examined at length. She admitted that Kesh Raj is her brother-in- law. She has also admitted that her husband and her brother-in-law Kesh Raj have strained relations with Gorkhu Ram father of the accused. A suggestion has been put to her that her brother-in-law Kesh Raj had raped the mother of the accused which has been denied by her. She has denied the suggestion that she has lodged a false complaint at the instance of Kesh Raj. She was confronted with certain portions of her statement made to the police to point out contradictions in the two statements. These so-called contradictions are that whereas in the statement she stated in court that she had handed over a Garvi (Lotta) of Lassi to the accused for being left at her house, this fact did not find mention in Ex.DA the statement recorded by the police. Similarly whereas in her statement in Court she has stated that she slapped her daughter, this fact is not mentioned in the Rapat Rojnamcha.

Learned counsel for the appellant-accused has placed great emphasis on the statement of PW10 Sandesh Kumari who turned

hostile. According to her, on 2.10.2004 at about 2 – 2-30 p.m., complainant Lalita Devi come to the Panchayat and complained that she had quarreled with Gorkhu. The prosecutrix was not with her. The witness then asked the complainant to come after some time. She again came with the prosecutrix and stated that the accused had misbehaved with her daughter. According to the witness, she asked the prosecutrix as to what had happened with her but the prosecutrix stated that nothing had happened with her. The witness was declared hostile and was cross-examined by the Public Prosecutor. In her cross-examination, she stated that the prosecutrix told her that she was beaten by her mother. She has denied the suggestion that the mother of the prosecutrix or the prosecutrix told her that the accused had tried to commit rape with the prosecutrix. She has denied the suggestion that she and Satnam Singh advised the mother of the prosecutrix to lodge the report with the police.

PW11 Satnam Singh states that when the mother of the prosecutrix again came to the Panchayat on 2.10.2004 at about 2.30 p.m. she complained that the accused had acted in an indecent manner with the prosecutrix on the cot and further complained that the accused was teasing her daughter at home. However, according to the prosecutrix, nothing was done by the accused. In cross-examination, he admits that Lalita had told that the accused was committing rape with her daughter on the cot. He also admits that they advised the mother of the prosecutrix to lodge a report with the police since the matter does

not fall within their purview. In cross-examination, he has stated that Lalita has lodged a false case.

No doubt PW10 Sundesh Kumari had not supported the case of the prosecution. However, her version cannot be believed. In the FIR it is specifically recorded that she had come with the complainant to lodge the FIR. Why would she have gone with the complainant to lodge the FIR in case nothing had happed as has now been stated by her? So far as the statement of PW-Satnam Singh is concerned, he has admitted in cross-examination that Lalita had told them that the accused had raped the prosecutrix.

The prosecutrix is a young girl. She was only 7 years. Therefore, conviction cannot be based solely on her statement since she may have been tutored. However, from the trend of her examination, it appears that she is telling the truth. Why should this young girl have come out with totally a false story? She has admitted the fact that the relations between the family of the accused and her family are not very cordial. She has given a version which appears to be plausible. Similarly, the statement of mother also inspires confidence. There is no reason as to why the mother should have falsely implicated the accused in a case of rape involving her 7 years old child. Normally, no mother would file such a false case which would ruin the reputation and future of her daughter. There are minor contradictions in her statement but these contradictions are minor in nature and will not affect the merits of the

case. Leaving aside the aforesaid fact, I find that there is also corroborative evidence in the present case.

The accused was examined by PW3 Dr. Sucha Singh on 5.10.2004 i.e. about 3 days after the incident. He has stated that he found a clean lacerated wound over the left ankle joint of the size of 2.8 x 8 cm with swelling, redness, tenderness with pus oozing out of it. According to the doctor, it was a simple injury caused with a blunt weapon. Thus the injury has been proved on the ankle of the accused which tallies with the version of the prosecutrix and her mother that the mother had hit the accused with a blunt side of the Drat. The injury is sought to be explained by examining DW1 Vijay Kumari, who states that there was a boundaries dispute between the parties and that Kesh Raj and Joginder Singh were holding Gorkhu. In the meantime, accused came to save his father Gorkhu and Lalita also came there and gave a blow of Drat on the foot of the accused. By examining this witness, the accused has admitted that he suffered the injury on his foot by a blow of a Drat given by Lalita. The version of the accused is that this Drat blow was given when the accused tried to rescue his father. However, no such suggestion has been put to the prosecutrix. The story of the accused that he was hit by Lalita Devi in a fight cannot be believed. If that had been so, then the accused would have definitely lodged some complaint against Lalita mother of the prosecutrix. In fact Joginder Singh was not present his house on that day. Even PW10 and PW11 have not stated that Joginder Singh was present in the village.

Therefore, the explanation of the accused is an afterthought and being false cannot be accepted.

PW1 Dr. Sushma Sharma who examined the prosecutrix on 4.10.2004 stated that as per the history given by the prosecutrix the accused who was her cousin brother forcibly took her in her room and threw her on the bed and she sustained injury on her forehead. He then closed her mouth and tried to insert his penis superficially in her private part. The mother had made a similar statement to the doctor. On examination, hymen was found intact. Vaginal swab smear cannot be examined as the patient was not allowing due to pain. The doctor then referred the prosecutrix to the Gynaecologist. She, however, came to the conclusion that there was nothing to suggest that sexual intercourse has not been done on the prosecutrix. In cross-examination, a suggestion was put to her by the learned counsel for the accused that she had been informed by the prosecutrix that the accused had rubbed his penis with her vagina superficially. This suggestion put on behalf of the accused clearly shows that the offence of attempt to rape is virtually admitted. The doctor further states that according to her opinion, sexual assault could not be ruled out.

Dr. Rama Thakur PW2, is much more forth-right and clear in her version. She examined the prosecutrix on 7.10.2004. She again states that when asked for the history, the child told her that the accused placed his private part on her vagina and that she felt mild discomfort at that time. According to her opinion, on clinical examination, the

possibility of sexual intercourse could not be ruled out. In her final opinion, she has again stated that there is nothing to suggest that sexual intercourse has not been done. She states that there is no evidence of penetration. However, slight degree of penetration could not be ruled out. She has further stated that she does not agree with Dr. Sushma that there was only sexual assault on the prosecutrix by the accused and no sexual intercourse was there. She further stated that there was no violent or forcible deep penetration.

I have considered the entire evidence in the present case. The evidence of the prosecutrix and her mother in my opinion inspires confidence. The version of the prosecutrix and her mother is supported by the medical evidence and the medical history recorded by the doctors PW1 and PW2. The version of the prosecutrix and her mother is also supported by PW3 who has found injury on the ankle of the accused which tallies with the statements of the prosecutrix and her mother. Therefore, in my opinion, it stands proved on record beyond reasonable doubt that the accused did untie the Salwar of 7 years old prosecutrix and lay down on top of her after taking off his pant. It also stands proved that he placed his penis on the private part of the prosecutrix. With regard to penetration, there is no categorical finding by either of the doctors that penetration in fact took place. Even PW2 Dr.Rama Thakur only states that slight degree of penetration could not be ruled out. Keeping in view all these facts, I feel that the offence of committing rape is not made out. However, there can be no manner of

doubt that the accused was attempting to rape the minor prosecutrix and if the complainant Lalita Devi had not fortuitously returned he would have succeeded in raping the minor girl. It also stands proved on record that she entered the house of the father of the prosecutrix with an intention to commit an offence. Therefore, in my opinion, the judgment of the learned trial Court is correct and the accused has rightly been convicted for the offence of attempting to rape the minor girl and of house trespass with intent to commit an offence.

Shri O.P.Sharma learned senior counsel for the accused-appellant states that the FIR has been lodged late and in this regard he has relied upon the decisions of Madhya Pradesh High Court in **Ramesh** versus **State of H.P,** 1986(3) Crimes 166 and in **Lal Singh versus State of H.P,** 2003 (2) Shim. L.C.1. In my opinion, the judgments referred to by the learned counsel are not applicable to the facts of the present case since in the present case reasonable explanation has been given. First the matter was reported to the Panchayat and she was asked to go to the police station. She then waited her husband and on the next day reported the matter to the police. Therefore, there is no un-explained delay in reporting the matter.

Shri Sharma then relied upon the judgment of Rajasthan High Court in **Papiya & anr** versus **State of Rajasthan**, 1994(2) Crimes 651 and contends that the sentence imposed upon the accused is

excessive. Keeping in view the fact that the prosecutrix was only 7 years old and the accused is a grown up young man, I find it difficult to deal with him leniently and, therefore, in my opinion, the imprisonment imposed upon the accused by the trial Court is justified.

In view of the aforesaid discussion, there is no merit in the appeal which is accordingly dismissed.

June 19, 2006 (Deepak Gupta),
s. Judge.